SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 495

G. E. BURFORD, ET AL.,
Petitioners,

vs.

SUN OIL COMPANY, ET AL.

No. 496

SUN OIL COMPANY, ET AL.,
Cross-Petitioners,

vs.

G. E. BURFORD, ET AL.

BRIEF FOR SUN OIL COMPANY AND MAGNOLIA PETROLEUM COMPANY

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CAPITAL PRINTING COMPANY, INC.

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vs.

G. E. BURFORD, ET AL.

BRIEF FOR SUN OIL COMPANY AND MAGNOLIA PETROLEUM COMPANY

Because this brief applies to both branches of this case, G. E. Burford, X YZ Oil & Gas Company and the Railroad Commission are herein referred to as "petitioners" and Sun Oil Company and Magnolia Petroleum Company are referred to as "cross-petitioners."

OPINIONS BELOW

The opinions of the Circuit Court of Appeals are reported in 124 F. (2d) 467, 130 F. (2d) 10, and 130 F. (2d) 18.

JURISDICTION

Jurisdiction of the Supreme Court of the United States is invoked under Section 240 of the Judicial Code as amended by act of February 13, 1925. 43 Stat. 938, 28 U.S.C.A. Sec. 347. The judgment to be reviewed was entered on July 11, 1942 (R. 440), and cross-petitioners' petition for rehearing was overruled on August 13, 1942. (R. 478) The cross-petition for writ of certiorari was filed in this court on October 27, 1942, and was granted on January 18, 1943.

Cross-petitioners urge, notwithstanding the remand by the Circuit Court of Appeals, that this court has jurisdiction to render final decree for cross-petitioners if the record is such that a final decree would be proper. **Harriman v. Northern Securities Co.**, 197 U. S. 244, 25 S. Ct. 493; **Spiller v. Atchison, T. & S. F. R. Co.**, 253 U. S. 117, 40 S. Ct. 466; **Wichita Roy. Co. v. City Natl. Bank of Wichita Falls**, 306 U. S. 103, 59 S. Ct. 420.

STATEMENT OF THE CASE

Sun Oil Company, as plaintiff, filed this suit in the United States District Court, Western District of Texas, Austin Division, against G. E. Burford. X Y Z Oil & Gas Company, the Railroad Commission of Texas and its members, as defendants. (R. 1) Magnolia

Petroleum Company intervened with a similar complaint against the defendants. (R. 34) Both complaints seek cancellation of orders of the Railroad Commission granting drilling permit for well locations described as Burford Nos. 1, 2, 3, and 4 on 2.33 acres, which in turn is a part of the W. L. Fuller 102.33 acre tract, Gregg County, Texas, East Texas Field; injunction against drilling and operation of the wells; and alternatively, for injunction against operation of the well locations until the Railroad Commission shall so adjust the total daily production from the 2.33 acres that it will be no greater, in proportion to comparative reserves, than the total daily allowable fixed by the Commission for wells on the remainder of the Fuller tract. (R. 29, 40).

X Y Z Oil & Gas Company is an assignee of Burford. (R. 28, 212).

Jurisdiction was asserted on grounds of diversity of citizenship and federal questions (R. 2) and found to exist on both grounds (R. 88-9, 90). Such a suit is expressly authorized by state statute. Acts 1935, 44th Leg., p. 180, ch. 76, sec. 14, Ver. Tex. Stats. 1936, Art. 6049c, sec. 8.[1]

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[1]This statute reads as follows:

"Any interested person affected by the conservation laws of this State relating to crude petroleum oil or natural gas, and the waste thereof, including this Act, or by any rule, regulation or order made or promulgated by the Commission thereunder, and who may be dissatisfied therewith, shall have the right to file a suit in a Court of competent jurisdiction in Travis County, Texas, and not elsewhere, against the Commission, or the members thereof, as defendants, to test the validity of such laws, rules, regulations or orders. Such suit shall be advanced for trial and be determined as expeditiously as possible and no postponement thereof or continuance shall be granted except for reasons deemed imperative by the Court. In all such trials, the burden of proof shall be upon the party complaining of such laws, rule, regulation or order; and such laws, rule, regulation or order so complained of shall be deemed prima facie valid."

The orders in controversy were granted as exceptions to the Commission's well spacing rule for the East Texas Field, which rule was adopted pursuant to powers granted by the Texas oil and gas conservation statutes[2] on findings that such general rule is necessary to prevent waste of oil and gas. (R. 111-134) This rule provides that no wells shall be drilled at lesser distances than 660 feet from other wells and 330 feet from property lines (i.e., ten acre spacing), but that exceptions may be granted when necessary to prevent waste or to prevent the confiscation of property. (R. 132-3)

The involved permit orders were granted solely under the "confiscation of property" exception clause. (R. 30, 32, 153, 155). The four locations are approximately 24 feet from the sides of the Burford 2.33 acre strip.[3] (R. 104)

Cross-petitioners attacked the permit orders on the grounds indicated below in the statement of contentions. (R. 20-1, 12-14, 22-3, 17-18, 19, 24-5)

The judgment of the district court found the issues of law and fact with the defendants, and dismissed the complaints. (R. 87-8) The Circuit Court of Appeals reversed and remanded the case for new trial (R. 439, 440) without adjudicating the merits, but cross-petitioners contend the record is such that final judgment

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[2]Acts 1919, p. 285; Acts 1931, 42nd Leg., 1st C.S., p. 46, ch. 26, secs. 1, 15; Acts 1932, 42nd Leg., 4th C.S., p. 3, ch. 2, secs. 1, 7; Acts 1935, 44th Leg., p. 180, ch. 76, secs. 2, 4; Ver. Tex. Stats., 1936, Arts. 6014, 6029.

[3]The Burford strip is referred to in exhibits as 2.21 acres, 2.4 acres, 2.81 acres, and 2.33 acres (R. 104, 138, 141, 168, 190)—a difference in surveying which is immaterial to the questions presented. Petitioners call it 2.33 acres and we shall so describe it.

for cross-petitioners should be entered on the undisputed evidence.

The 2.33 acres was created by voluntary subdivision of the leasehold estate in the Fuller 102.33 acres, the owner of the lease on the entire tract having assigned first, the east 50 acres now owned by Magnolia, and second, the west 50 acres to Sun Oil Company in February, 1931; thus leaving between the assigned portions the strip 49 feet wide. (Area A-B-C-D on Exhibit 1, R. 104; R. 108, 109-110, 3-4) The Commission's original spacing rule, requiring wells to be not less than 150 feet from property lines nor less than 300 feet from other well locations, was in effect when this subdivision was made. (R. 111) By subsequent amendments the spacing requirements were increased to a minimum of 330 feet from property lines and 660 feet from other wells. (R. 112-134) The Railroad Commission's general order of May 29, 1934, provides that in applying the spacing rule no subdivision of property made subsequent to adoption of the original rule shall be considered in determining whether any property is being confiscated within the terms of the rule. (Allegations of Complaint, R. 8-9, undenied by answers, R. 41, 45, 49) Cross-petitioners contend that under the settled law of Texas the Railroad Commission had no power to grant a permit on the strip under the "confiscation of property" exception clause.

On October 11, 1934, before the strip was assigned to Burford and X Y Z Company, the Commission granted Mamie Hammonds permit to drill on this same strip (R. 163) on **both** grounds of exception to the spacing rule (R. 190-1); and in Cause No. 54769 (consolidated with No. 54743), District Court of Travis County, Texas, cross-petitioners obtained a final judg-

ment (R. 185) against the Railroad Commission, Hammonds and others (predecessors of Burford and X Y Z Company—R. 212), canceling the permit order on allegations that it was granted in violation of the spacing rule and that the strip was not entitled to development as a separate tract. (R. 164, 174-6) The land from which the strip was last subdivided is as well protected from drainage and is recovering the oil through existing wells as efficiently as it was when the prior permit was granted. (R. 375-6, 395-6) Cross-petitioners contend that under the settled law of Texas the judgment in such prior suit is **res adjudicata** that the Railroad Commission was without power to regrant a permit on the strip under the "confiscation of property" exception clause.

The statement on page 6 of Petitioners' Brief, that substantial changes in conditions have occurred, is inaccurate for reasons hereinafter shown.

Cause No. 53915, styled Sun Oil Company v. Railroad Commission and Mamie Hammonds, in which Magnolia intervened, was pending in the District Court of Travis County for final trial at the time Burford's application was filed, heard and granted by the Railroad Commission. (R. 205-6, 208) Said suit was for the purpose of canceling still another order granting Mamie Hammonds permit to drill on this same strip, and it was an issue in said suit that the strip, being a subdivision, was not entitled to be developed as a separate tract under the spacing rule. (R. 192, 197-8, 203) Contrary to the statement on page 6 of Petitioners' Brief that this prior permit had been abandoned, which statement has no support in the record other than a mere contention by counsel, the proof shows that such prior case came on for trial and was

tried by the District Court of Travis County, Texas, after the Burford permit was granted, and final judgment was rendered canceling the Hammonds permit order there involved. (R. 208) Cross-petitioners contend that under the settled law of Texas the pendency of such suit to cancel the prior permit order deprived the Railroad Commission of jurisdiction to grant **pendente lite** another permit on the same tract.

It was shown that Burford did not contend he needed four wells to enable him to recover the equivalent of the oil in place under the strip (R. 233-293, 294-317, 318-365), but that one well on the strip would produce more oil than there is under it. (R. 362-3) The Commission's proration order allowed each well in the area to produce up to a flat 20 barrels per well daily, irrespective of the size of the tract or reserves in place. (R. 370) Sun's 50 acre lease had seven wells and Magnolia's 50 acre lease had six wells. (R. 18, 104, 141) The allowable of four wells on the strip would be approximately 4/7ths as great as the total allowable of Sun's 50 acres and approximately 2/3rds as great as the total allowable of Magnolia's 50 acres; and this will result in drainage from the adjacent tracts. (R. 349-350; 368-9) With four wells on the strip, Sun will lose between 70,000 and 100,000 barrels of oil which its wells would otherwise produce (R. 369), and Magnolia's loss of oil to the Burford locations will be about 50% as much as Sun's loss. (R. 377) The four locations on the strip are each approximately 24 feet from cross-petitioners' leases, whereas cross-petitioners' nearest wells are roughly 330 feet from the strip (R. 104), and allowance of the Burford locations will make it necessary for Sun and Magnolia to drill additional wells "just to meet the

offsets" (R. 368-9), and such a concentration of wells would lower the pressure, reduce the flowing life, and increase the operating expenses. (R. 371, 376-7) Cross-petitioners tendered an offer to pool their leases with the strip for development as an entire tract in either of three ways: (a) the strip and the Sun lease; (b) the strip and the Magnolia lease; and (c) one half of the strip with the Sun lease and one half with the Magnolia; and under either method offered to share ratably the future production from the pooled property in proportion to the acreage so contributed by each owner, less deduction in the same proportion for future drilling and operating expenses. (R. 158, 19)

For both reasons given in the preceding paragraph, the statement on page 5 of Petitioners' Brief, that without the wells granted Burford would have no opportunity to recover the oil under his tract or its equivalent, is inaccurate.

Cross-petitioners urged in the alternative, both before the Railroad Commission and in court, that if the strip is to be allowed four wells, the allowable thereof should be so adjusted as to be in proportion to the allowable on the remainder of the Fuller tract, and by alternative prayer in this suit seeks injunction against operation of said wells until such adjustment is made. (R. 159-160, 29) Such an adjustment would give the Burford strip its share of the oil and would lessen the drainage from cross-petitioners' leases. (R. 370-1)

Cross-petitioners contend that since one well would produce more oil than is under the strip, under the settled law of Texas the Railroad Commission was without power to grant the strip additional wells under the "confiscation of property" exception clause;

that to grant it more than one, and at the same time deny the requested adjustment of allowable, all in the face of cross-petitioners' offer to pool, exceeds the necessities of the case and was so arbitrary, discriminatory, and confiscatory as to violate cross-petitioners' rights under the Fourteenth Amendment to the Constitution of the United States, as well as their rights under the laws of Texas.

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

(1) In failing to render judgment annulling the permit orders and granting injunctive relief ancillary thereto as prayed by cross-petitioners, on the undisputed evidence that the 2.33 acres was voluntarily subdivided from the west 50 acres in such way that it does not comply with the spacing rule, and that, disregarding the subdivision, the west 52.33 acres did not need additional wells to protect it from drainage, the law of the State being that under such circumstances the Commission has no power to grant permits on the strip "to prevent confiscation of property," the sole ground on which these permit orders were granted.

(2) In failing to render judgment annulling the permit orders and enjoining drilling and operation of the locations involved, because as a matter of State law, under the undisputed evidence, the judgment in Cause No. 54769 (consolidated with No. 54743) is **res adjudicata** against Burford's and X Y Z Company's claim of right to the permits here involved and against the Commission's claim of power to grant them.

(3) In failing to render judgment annulling the permit orders and granting ancillary injunctive relief,

because under the law of the State the pendency of Cause No. 53915 in the District Court of Travis County, Texas, deprived the Railroad Commission **pendente lite** of jurisdiction to grant permits to Burford on the same tract there involved.

(4) In failing to render judgment annulling the permit orders and enjoining drilling and operation of the locations involved, because, if the strip may be lawfully considered as a separate tract, then as a matter of State law, the Commission's action in permitting four locations was arbitrary in view of the undisputed evidence that there is no necessity for four, or more than one, to give the owners of the strip an opportunity to recover the amount of oil in place or to prevent confiscation of their property, and that the drilling of four thereon will cause drainage of large quantities of cross-petitioners' oil and otherwise injure their property; the granting of four locations being without authority in the State law, and deprives cross-petitioners of equal protection of the law and of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

(5) In failing to render judgment granting cross-petitioners' alternative prayer for injunction against production of oil from the wells in controversy until the Railroad Commission shall, after due notice and hearing, enter an order so adjusting the allowable production from the wells on the 2.33 acres that the total daily allowable from the wells thereon shall not bear a greater proportion to the total daily allowable fixed by the Commission for the wells on the remainder of the Fuller 100 acre tract than the oil reserves in place under the 2.33 acres bear to the oil

reserves in place under the remainder of the Fuller 100 acre tract, under the undisputed evidence that one well would give the strip its full share of oil, that cross-petitioners had offered to pool, and that either such pooling or adjustment of allowables would afford the owners of the strip the amount of oil under it and at the same time would prevent or greatly reduce the drainage from cross-petitioners and other injuries which will otherwise occur; it appearing as a matter of law that without such relief the granting of four wells exceeded the neccssities of the case and was arbitrary, discriminatory, and confiscatory as to cross-petitioners, denying them equal protection of the law and taking their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

(6) In failing to hold that the trial court erred in its finding of fact No. V, to the effect that the conditions have so changed since the granting of the Hammonds permit for well No. 1 on the strip that the judgment in Cause No. 54769 is not **res adjudicata** of the permits in the case at bar.

(7) In failing to hold that the trial court erred in concluding and holding that the challenged order of the Railroad Commission does not violate any of the rights of plaintiff or intervener under the Fourteenth Amendment to the Constitution of the United States.

SUMMARY OF ARGUMENT

1. The 2.33 acre strip was voluntary subdivided for oil development purposes by lease assignment, and is too narrow to be separately developed under the spacing rule in existence at the time or any subsequent

rule. Under the settled law of the State the Railroad Commission was not authorized to grant the permits on the strip under the exception clause "to prevent confiscation of property," and its action in doing so was arbitrary and illegal.

2. Under the settled law of Texas the judgment in Cause No. 54,769, canceling a prior permit on the strip, is **res adjudicata,** establishing that the Commission could not grant a permit for the development of the 2.33 acres as a separate tract under the "confiscation of property" exception clause. It is undisputed that the west 52.33 acres from which the 2.33 acre strip was subdivided was as well protected from drainage when the Burford permits were granted as it was when the permit canceled in Cause No. 54,769 was granted; hence, there has been no material change of conditions from the standpoint of "confiscation" since that judgment was rendered.

3. Under the settled law of Texas the pendency of Cause No. 53915, involving validity of a permit previously granted to Mamie Hammonds on this same strip, and placing in issue the right to drill the strip as a separate tract, deprived the Railroad Commission of jurisdiction to grant Burford permits to drill on the strip.

4. The act of the Commission in granting a permit for four wells on the strip was invalid under the Texas law, because there was no evidence that the strip, if entitled to separate development, needed four wells to prevent confiscation (i.e., to recover its fair share of the oil), and the undisputed evidence showed that one well will produce more than the amount of oil under it.

5. The evidence heard by the District Court was not sufficient to sustain its findings and conclusions that the order attacked was valid under the State law.

6. The action of the Railroad Commission in permitting four wells on the strip in the light of the existing proration order and cross-petitioners' offer to pool their properties with the strip for development purposes, when it was undisputed that one well would have given it more than its full share of the oil, and without making proper provision for the protection of cross-petitioners' properties by adjusting the allowable of the wells on the strip, exceeded the necessities of the case, and was arbitrary, discriminatory, and confiscatory as to cross-petitioners, and denies them equal protection of the law and takes their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and the law of Texas.

7. It was the duty of the trial court and the Circuit Court of Appeals to apply the State law and grant cross-petitioners the relief they were entitled to thereunder, the federal court having jurisdiction both on grounds of diversity of citizenship and federal questions.

8. The Circuit Court of Appeals had jurisdiction to vacate or correct its original judgment and opinion in this case more than three months after the first petition for rehearing had been denied because the term of court at which judgment was rendered had not expired.

9. The Circuit Court of Appeals did not abuse its discretion in granting the second petition for rehearing because the law as announced in Selby Oil & Gas Co. v. Railroad Commission, 128 F. (2d) 334, after

overruling the first petition for rehearing, was inconsistent with the law as announced and followed in rendering the original judgment in this case and justice required that the court conform its decision thereto.

10. In the event of a remand, the trial court should independently determine any disputed fact issue in testing the validity of the permit orders involved, as required by the State law.

ARGUMENT

I.

The 2.33 acre strip was voluntarily subdivided for oil development purposes by lease assignment, and is too narrow to be separately developed under the spacing rule in existence at the time or any subsequent rule. Under the settled law of the State the Railroad Commission was not authorized to grant the permits on the strip under the exception clause "to prevent confiscation of property," and its action in doing so was arbitrary and illegal.

It was stipulated that the oil and gas lease on the Fuller tract (See area A-B-C-D, Exhibit 1, R. 104; actual acreage 102-1/3 acres, R. 108) was divided in the following manner: The owner first assigned the east 50 acres now owned by Magnolia, and thereafter in February, 1931, assigned the west 50 acres to Sun Oil Company, leaving the strip 49 feet wide between the assigned portions. (R. 109-10, 3-4, 104) At that time the spacing rule required wells to be not less than 150 feet from lines nor less than 300 feet from other wells (R. 111); hence the strip was too narrow to be

separately drilled in compliance with the rule then in effect. By all subsequent rules applicable to this field, the spacing requirements were a minimum of 330 feet from lines and 660 feet from other wells, with which requirements the strip, of course, does not comply. (R. 112-134) The original rule authorized exceptions "to protect vested rights" (R. 111), which language was subsequently changed to read "to prevent confiscation of property" (R. 133), but the Texas courts hold both phrases as used in the rule have the same meaning.[4] That the change in language did not change the meaning should be borne in mind in reading the decisions hereinafter cited.

The Railroad Commission's general order of May 29, 1934, provides that in applying the spacing rule no subdivision of property made subsequent to adoption of the original rule shall be considered in determining whether any property is being confiscated within the terms of the rule. (Allegations of Complaint, R. 8-9, undenied by answers, R. 41, 45, 49)

Both tracts created by the **original** subdivision of the Fuller tract (the east 50 and the west 52.33 acres) were sufficiently large to be drilled in compliance with the spacing rule then in effect; but of those created by the **second** subdivision, only the west 50 acres was sufficiently large and the 2.33 acre strip was too narrow. (R. 104) This latter subdivision, rather than the first, is objectionable. **Gulf Land Co. v. Atlantic Refining Co.**, 134 Tex. 59, 131 S. W. (2d) 73, 80-1; **Falvey v. Simms Oil Co.**, 92 S. W. (2d) 292.

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[4]Nash v. Shell Petroleum Corp., 120 S.W. (2d) 522, 523, writ dismissed; Lippincott v. Atlantic Refining Co., 128 S.W. (2d) 847, 848, writ dismissed, correct judgment.

According to undisputed evidence, the west 52.33 acres, without Burford's four locations, was reasonably protected from drainage and will recover its recoverable oil with the wells already drilled. (R. 367-8) Hence, such larger tract did not need these additional wells under the "confiscation" exception clause, as interpreted or defined by the Supreme Court of Texas. **Railroad Commission, et al. v. Gulf Production Co.,** 134 Tex. 122, 132 S. W. (2d) 254, 255; **Gulf Land Co. v. Atlantic Refining Co.,** 134 Tex. 59, 131 S. W. (2d) 73, 85. And even without this showing, the permit would not be sustainable on the theory that the additional wells were needed on the larger tract, because they were not granted on that basis. **Shell Petroleum Corp. v. Railroad Commission,** 133 S. W. (2d) 194, 196; **Humble Oil & Refining Co. v. Potter,** 143 S. W. (2d) 135, 136, 137; **Stanolind Oil & Gas Co. v. Midas Oil Co.,** 143 S. W. (2d) 138 (writ refused).

Burford applied for, and the Railroad Commission granted, the permits on the basis of considering the subdivision rather than disregarding it. See Burford's "Form 1" applications and plats (R. 138, 141, 147, 150); the notices of hearings issued only to owners of leases adjacent to the strip, not to those adjoining the tract from which it was subdivided' (R. 142, 152, 385, 104); and the Commisson's order granting No. 2 following the second hearing, and order granting all four locations following the third hearing, each dealing with it as a 2.33 acre tract. (Complaint, paragraph 5, R. 10-12, admitted by answers; R. 153, 30; 155, 31-2; 161)

The permits were granted on the sole ground of necessity "to prevent confiscation of property." (R. 30, 32, 153, 155)

'Notice was not sent to Amerada Petroleum Corporation whose lease adjoins the northwest portion of the Fuller tract.

The Burford strip having been created by voluntary subdivision from the west 50 acres in such width that it cannot be drilled in compliance with the spacing rule in existence at the time, under the settled law of Texas the Railroad Commission was without power to grant an exception to the spacing rule authorizing drilling of wells on the strip on the ground of necessity "to prevent confiscation of property," and therefore the Burford permit orders are void. **Gulf Land Company v. Atlantic Refining Company,** 134 Tex. 59, 131 S. W. (2d) 73, 81, holding with reference to such subdivisions, "exception permits may be issued to protect such tracts from waste; but such exception permits cannot be issued to protect such tracts, as such, from confiscation."

This was the established law of the State even before the Railroad Commission adopted its order of May 29, 1934. **Sun Oil Company v. Railroad Commission,** (Civ. App.) 68 S. W. (2d) 609, 613, affirmed 125 Tex. 540, 84 S. W. (2d) 693, applying this same rule and explaining the underlying reason therefor to be that the spacing rule, validly issued and operating prospectively, has the same force and effect as a legislative act, and therefore all parties dealing with mineral leasehold titles must take cognizance of the rule and make their contracts and conveyances in keeping with its terms and not in violation of it, so that no right to an exception can arise from the carving out of a tract, while the rule is in effect, in such shape or size that no well can be drilled thereon in compliance with the rule; that to hold otherwise would set at naught the conservation laws of the state; and that the Commission, while keeping the general spacing rule in effect, cannot itself arbitrarily grant

exceptions thereto which would indubitably destroy the efficacy of the rule itself.

Other decisions enforcing this rule are **Brown v. Humble Oil & Refining Co.**, 126 Tex. 296, 83 S. W. (2d) 935, 945; **Lippincott v. Atlantic Refining Co.**, (Civ. App.) 128 S. W. (2d) 847, 848; **Humble Oil & Refining Co. v. Railroad Commission**, 68 S. W. (2d) 625 (application for writ dismissed); **Smith v. Stewart**, 68 S. W. (2d) 627, affirmed 83 S. W. (2d) 945; **Railroad Commission v. Lamb**, 81 S. W. (2d) 161, 163; **Barnsdall Oil Co. v. Railroad Commission**, 83 S. W. (2d) 714 (writ refused); **Smith v. Shabay**, 83 S. W. (2d) 719; **Humble Oil & Refining Co. v. Railroad Commission**, 85 S. W. (2d) 813 (application for writ dismissed); **Edgar v. Stanolind Oil & Gas Co.**, 90 S. W. (2d) 656, 657 (writ refused); **Barnsdall Oil Co. v. Railroad Commission**, 90 S. W. (2d) 663; **Shell Petroleum Co. v. Burnett**, 91 S. W. (2d) 1091; **Railroad Commission v. Royal Petroleum Corp.**, 93 S. W. (2d) 761 (writ dismissed); **Stanolind Oil & Gas Co. v. Railroad Commission**, 92 S. W. (2d) 1057 (writ refused); **Empire Gas & Fuel Co. v. Railroad Commission**, 94 S. W. (2d) 1240, 1242 (writ refused); **Railroad Commission v. Wood**, 95 S. W. (2d) 1328 (writ refused); **Murphy v. Turman Oil Company**, 97 S. W. (2d) 485, 487 (writ dismissed); **Tide Water Associated Oil Co. v. Railroad Commission**, 120 S. W. (2d) 544, 545.

The Railroad Commission cannot grant permits in disregard of its own rule, and if it does they are void and the courts will annul them. **Sun Oil Company v. Railroad Commission**, (Civ. App.) 68 S. W. (2d) 609, 612; **Atlantic Oil Production Co. v. Railroad Commission**, 85 S. W. (2d) 655, 657 (writ dismissed); **Brown v. Humble Oil & Refining Co.**, 126 Tex. 296, 83 S. W.

(2d) 935, 944-5; **Gulf Land Company v. Atlantic Refining Co.**, 134 Tex. 59, 131 S. W. (2d) 73, where in affirming judgment canceling a permit, the court said (p. 79) "We think the Commission is bound by its own rule . . . . " and (p. 86) "It is evident from what we have said that we hold the Commission violated its own order in issuing this well permit to prevent confiscation of property."

Petitioners cannot escape the effect of the subdivision rule on the theory that this 2.33 acre strip is in "substantial compliance" with the spacing rule in effect when the subdivision was made. Many Texas cases hold strips wider and containing more acreage than this one are in violation of the rule and none hold that a strip this narrow is in "substantial compliance."

The two cases relied upon by petitioners involved strips 280 feet and 260 feet wide, respectively, and the opinions clearly show that the court would not have regarded as analogous the 49 foot strip involved in this case, and would not have held it to be in "substantial compliance."

The tract involved in **Humble Oil & Ref. Co. v. Railroad Commission**, 94 S. W. (2d) 1197 was 280 feet wide, so that a location in the center lacked only 10 feet of being the distance from the sides required by the spacing rule in effect at the time the tract was subdivided from adjoining land. The location fell 140 feet from the north and south lines instead of the required 150 feet. It is apparent that when equidistant offsets to such application are drilled, they would then be 280 feet apart instead of the required 300 feet, which would be only 20 feet short of the required distance of 300 feet under the 150-300 foot spacing provisions of Rule 37 in effect when the subdivision was

made. These shortages are only 6.6% of the required distances. We especially call the court's attention to the reasoning of the Court of Civil Appeals. (94 S. W. (2d) at 1199).

Likewise **Wencker v. Railroad Commission**, 149 S. W. (2d) 1009, is distinguishable on the facts. It involved the right to drill on a 7.88 acre tract having an average width of approximately 260 feet and an average length in excess of 1600 feet, which had been subdivided from adjoining lands while the 150-300 foot spacing provisions of Rule 37 were in effect. We call attention to the reasoning of the Court. (149 S. W. (2d) at 1010, 1012, 1013).

It is to be noted that a well in the center of the Wencker tract would be 130 feet from the sides (only 20 feet short of the required distance of 150 feet), and that direct offsets to such a well would be 260 feet distant, which is only 40 feet short of the required distance of 300 feet between wells. These shortages are only 13.2% of the required distances.

These slight variances in the Humble and Wencker cases are trivial indeed when compared with the 49 foot strip involved in the case at bar. A well in the center of the strip here involved would be only 24.5 feet from the sides, and direct offsets to wells on the strip would be only 49 feet distant, instead of the required 300 feet. The extent of compliance would be only 16.3% of the required distances, and the violation or non-compliance would be 83.7%. Clearly, the development of this strip as a separate tract would bring about a most flagrant violation of the spacing provisions, and a far more serious situation is involved than the minor discrepancies in the Humble and Wencker cases.

In **Sun Oil Co. v. Railroad Commission, et al.,** (Civ. App.) 68 S. W. (2d) 609, 610, a strip containing **2.59 acres, 33 feet wide by 3342 feet long,** was subdivided (according to the permittee's contention, on which basis the case was tried) on July 21, 1930, while the 150-300 foot rule was in effect. The court held this strip was a subdivision in derogation of the spacing rule, not entitled to separate development as such. (**Affirmed** by the Supreme Court of Texas, 125 Texas 540, 84 S. W. (2d) 693.)

In **Smith v. Stewart,** (Civ. App.) 68 S. W. (2d) 627, 628, the strip was **1234 feet long, 104 feet wide at one end, 37 feet wide at the other, and contained 1.8 acres.** It was subdivided from a larger tract capable of development as a whole on April 19, 1929, while the 150-300 foot rule was in effect. The Court held this was a subdivision in derogation of the spacing rule and that the strip was not entitled to separate development. This holding was **affirmed** by the Supreme Court of Texas in **Stewart v. Smith,** 126 Texas 292, 295, 83 S. W. (2d) 945, 946. The acreage of 1.8 is not substantially different from 2.07 acres, which petitioners are insisting is the test.

In **Smith v. Shabay,** (Civ. App.) 83 S. W. (2d) 719, 720, the strip contained **7.5 acres, and was 1825 feet long, 175 feet wide at one end and 185 feet wide at the other.** It was subdivided from adjoining land capable of development as a whole in compliance with the 150-300 foot rule by leases dated April 21, 1928, and March 26, 1930. The court held this subdivision was in violation of the rule and that the strip was not entitled to separate development as such. Apparently writ of error was not applied for.

In **Humble Oil & Refining Co. v. Railroad Commission,** (Civ. App.), 85 S. W. (2d) 813, 815 (petition for writ of error dismissed), the strip involved was **80 feet wide and 2640 feet long,** containing a total of **5.87 acres.** Note that it is wider, longer, and larger than the Burford strip. It was subdivided in 1928, while the 150-300 foot rule was in effect, from adjoining land capable of development as a whole in compliance with that rule; and the court held that the subdivision was in violation of the rule and that the strip was not entitled to development as such. The court held void the permit granted by the Commission.

In **Edgar v. Stanolind Oil & Gas Co.,** (Civ. App.) 90 S. W. (2d) 656, 657 (writ of error **refused** by the Supreme Court of Texas), the strip involved was **132 feet wide at the north end, 70 feet wide at the south end, 1600 feet long and contained 3.99 acres.** It was created on September 18, 1930, while the 150-300 foot rule was in effect. The court held the subdivision was in violation of the rule and that the strip was not entitled to development as a separate tract, and canceled permit under attack in that case. **By the refusal of writ of error the Supreme Court of Texas placed its stamp of approval upon this opinion and holding.**

In **Tide Water Associated Oil Company v. Railroad Commission, et al.,** (Civ. App.) 120 S. W. (2d) 544, 545, the strip involved was **105 feet wide and 825 feet long,** containing a total of **2.00416 acres.** The strip was created by subdivision "early in 1931," and the Examiner's Memorandum mentioned that the acreage was in "substantial compliance" with 2.07 acre spacing which results from spacing wells 300 feet apart. But the court held that this subdivision was in derogation

of the spacing rule, and the strip was not entitled to a permit to protect vested rights. (Actually, the permit was upheld on the theory that it was necessary to prevent waste, but that point is immaterial to the one now under discussion.) Writ of error was not applied for.

In **Railroad Commission v. Wood,** 95 S. W. (2d) 1328, 1329 (writ of error **refused** by the Supreme Court of Texas), the strip involved was **300 feet long and 277 feet wide, containing 2 acres.** It was subdivided from adjoining land "in 1930 or 1931," while the 150-300 foot rule was in effect, and it was held this subdivision was in derogation of the rule and that the 2 acres was not entitled to separate development.

It should be borne in mind that Rule 37 did not mention "2.07 acres," which petitioners assert is the deciding test of "substantial compliance." The rule provides only that wells shall not be less than 150 feet from property lines or less than 300 feet from other wells. (R. 111) It speaks in terms of spacing distances, not in terms of acreage. If the strip involved in the Wood case was a violation of the rule, how can it be said that the Burford strip is a compliance with it?

In **Magnolia Petroleum Co., et al., v. Railroad Commission, et al.,** (Civ. App.) 127 S. W. (2d) 230, 231, 232-3, (writ of error dismissed, W.O.J.), the Commission had granted permit to drill a well on **5.08 acres,** being a strip **141 feet wide and 1565 feet long.** The case was tried on the permittee's theory that this 5.08 acres had not been included by the lessor in a lease of adjoining land in 1930 while the 150-300 foot rule was in effect; and the Court held that the strip constituted a voluntary subdivision which gave no vested

right entitling the owner of the mineral estate therein to a permit to drill the strip separately. Thus, the court did not regard this strip as a "substantial compliance," although it is **more than twice as large and almost three times as wide as the Burford strip.** (Actually, the permit was upheld on another and different theory based on the holding of the Texas Supreme Court in the so-called "Century case," the law on which other theory has since been changed by subsequent holding of the Supreme Court of Texas in **Gulf Land Company v. Atlantic Refining Co.**, 134 Texas 59; but this is immaterial to the point under discussion.)

In **Stanolind Oil & Gas Co. v. Midas Oil Company**, (Civ. App.) 143 S. W. (2d) 138, 139, 140 (writ of error **refused** by the Supreme Court of Texas), the Commission had granted permit to drill a well on a **2.14 acre strip, 1200 feet long by 70 feet wide,** which had been subdivided in 1931 from adjoining land while the 150-300 foot rule was in effect. (The opinion, page 139, refers to opinion of the court in a prior appeal of the same case for full statement of the facts, **Stanolind Oil & Gas Co. v. Midas Oil Co.**, (Civ. App.) 123 S. W. (2d) 911, in which the facts appear on pages 912 and 914). The court held that this 2.14 acre tract was not entitled to an exception for separate development (p. 139), being "a voluntary subdivision after Rule 37 became applicable to it" (p. 140). **It will be noted that this strip contained more than 2.07 acres, is wider than the Burford strip and that the Supreme Court of Texas by refusing writ of error has approved this holding of the Court of Civil Appeals.** The refusal of this writ is, so far as we can find, the last official pronouncement by the Supreme Court of Texas, either

by opinion or by approval of opinion, relating to this question of "substantial compliance."

The purpose of the spacing rule was to achieve even distribution of wells and even withdrawal of oil, thus preventing waste, not merely to achieve an "average density" of 2.07 acres per well, which could be accomplished, for instance, by drilling 10 wells in **one corner** of a 20.7-acre lease and none on the remainder of the tract. The purpose of the rule is not fulfilled by granting wells 24 feet from lines and offsets 49 feet away.

We have examined on its merits the applicability of the "substantial compliance" theory to the Burford strip. **But petitioners' contention that this strip is entitled to separate development is not sustainable for the additional reason that this very issue has heretofore been litigated to final judgment adverse to petitioners, in a prior suit between cross-petitioners, the Railroad Commission of Texas and Burford's predecessors in title,** which judgment is asserted as **res adjudicata.**

II.

Under the settled law of Texas the judgment in Cause No. 54,769, canceling a prior permit on the strip, is res adjudicata, establishing that the Commission could not grant a permit for the development of the 2.33 acres as a separate tract under the "confiscation of property" exception clause. It is undisputed that the west 52.33 acres from which the 2.33 acre strip was subdivided was as well protected from drainage when the Burford permits were granted as it was when the permit canceled in Cause No. 54,769 was granted; hence, there has been no material change of conditions

from the standpoint of "confiscation" since that judgment was rendered.

On October 11, 1934, before the strip was assigned to Burford and X Y Z Company, the Commission granted Mamie Hammonds permit to drill on this same strip (R. 163), and in Cause No. 54769 (consolidated with No. 54743), District Court of Travis County, Texas, cross-petitioners obtained a final judgment (R. 185) against the Railroad Commission, Hammonds and others (predecessors of Burford and X Y Z Company—R. 212), canceling the permit order on allegations that it was granted in violation of the spacing rule and that the strip was not entitled to development as a separate tract. (R. 164, 174-6) The judgment in the consolidated cause found the law and the facts to be with the plaintiffs, canceled the permit and perpetually enjoined the drilling and operation of the well. (R. 186-8) The Hammonds permit was granted both to prevent waste and to protect the property from confiscation. (R. 190-1, 155, 32)

Cross-petitioners urged the judgment as **res adjudicata** before the Commission (R. 234-6, 296, 330-1, 157), and in their Complaints assert that there has been no such change of conditions as would entitle the strip to a permit, the reservoir conditions under the strip being the same and bearing the same relation to the reservoir conditions in the field generally as at the date of said judgment and date of the permit thereby canceled; and that the Burford locations are no more necessary than the location canceled by said judgment. (R. 12-13) Undisputed testimony shows there had been no change of conditions requiring any of Burford's well locations to enable the west 52.33 acres of the

Fuller tract to recover the equivalent of the oil under it or to protect it from drainage, and the west 52.33 acres is as well protected from drainage and is recovering the oil through existing wells as efficiently as it was when this prior permit was granted. (R. 375-6) This was corroborated by defendants' witness. (R. 395-6)

Shell Petroleum Corp. v. Railroad Commission, 86 S. W. (2d) 57, 59 (writ dismissed), involved a suit to cancel a permit which had been granted by the Commission on the same grounds as a former permit canceled in a prior suit between the same parties. The later permit moved the location 30 feet. The court held the **general judgment** rendered in the former suit, finding both the law and the facts with the plaintiff, constituted **res adjudicata** of these issues in the second suit, stating:

> "Applying these rules to the instant case the following appears: In the former suit, judgment in which is here pleaded as res adjudicata, the same relief was sought as in this suit. * * * In that case a general judgment was rendered by the court without indicating upon what grounds it was based. None of the issues made by the pleadings and the evidence in that case were by the court excluded 'from the effect of the adjudication.'
>
> "In the case at bar the same subject-matter between the same parties is involved . . . the identical issues of drainage and waste were pleaded; and the same evidence on these issues was before the court in both cases. Thus not only were these same issues made by the pleadings in both cases, but the same evidence used in both. That being true, under well-settled rules of law,

> the judgment rendered in the former trial, and pleaded herein, is conclusive of the issues presented in the instant case, and the trial court should have so held."

The judgment canceling the Hammonds permit in Cause No. 54,769, was a **general judgment,** and the subdivision question here raised was raised and adjudicated in the former suit. While the testimony offered in the former suit has not been reoffered in this suit, that is immaterial, because the facts as to subdivision are established by the lease and the assignments, which are necessarily the same; and the undisputed proof in this record is that the west 52.33 acres is still protected from confiscation as it was when the Hammonds permit was granted; hence, the fact that additional wells have been drilled and oil has been produced and the pressure thereby lowered are immaterial changes. They are not changes to the disadvantage of the west 52.33 acres. In fact, defendants' witness testified the 52.33 acres is better off now than it was when the Hammonds permit was granted. (R. 396)

On this point the Supreme Court of Texas stated in **Magnolia Petroleum Co. v. New Process Production Co.,** 129 Tex. 617, 104 S. W. (2d) 1106, 1110:

> "We will say, however, that we are of the opinion that the Railroad Commission is without power to review or set aside judicial orders and decrees. In such instances the commission can only grant an application for a well where there is a showing of changed conditions."

In **Railroad Commission (Acme) v. Humble Oil & Refining Co.,** 119 S. W. (2d) 728, 729, 730 (writ re-

fused), a judgment in a prior suit canceling a permit was held to be **res adjudicata** of a subsequently granted permit; and in overruling the contention that there had been a change of conditions, the court held that the change necessary to defeat the plea of **res adjudicata** must be **material**; and that the drilling of 3500 additional wells in the field, and the reduction of the bottom hole pressure in the area, and the reduction of the allowable per well, all of which were common to the field as a whole, and the changing of the location 20 feet in the new permit, were not material changes, and did not remove the bar of **res adjudicata.**

The doctrine of **res adjudicata** in these suits has been recognized in prior decisions of the Federal Court.

In **Smith v. Merrill,** 81 Fed. (2d) 609 (C.C.A. 5th). the facts were that Merrill had brought a prior statutory suit in the District Court of Travis County, seeking to set aside the action of the Commission in denying him permit to drill, and to enjoin interference with the drilling and operation of, his proposed well, and a general judgment had been rendered that plaintiff take nothing. He thereafter brought a suit in Federal District Court complaining of the action of the Railroad Commission in denying him permit to drill on the same tract at a location 50 feet from the prior location. The court held that every essential element to support **res adjudicata** was present and sustained the plea.

In **Gulf Land Co. v. Atlantic Refining Co.,** 113 Fed. (2d) 902, 905 (C.C.A. 5th), the appellant contended a judgment canceling a prior permit granted to prevent confiscation was not **res adjudicata** of a sub-

sequent permit in so far as it was granted to prevent confiscation, because additional wells had been drilled on the land adjacent to a 6.88 acre tract, from which the Gulf Land Company 2.35 acres had been subdivided. The court overruled that contention with the following holding:

> "The facts which appellants claim make the situation different now from what it was when the permit was granted before do not do so. They merely show that there has been a lessening of some of the great disadvantages, under which owners of tracts adjoining the 6.88 acre tract have been laboring. They do not show that all of these disadvantages have been taken away, much less do they show that the 6.88 acre tract has been put at a disadvantage requiring the issuance of the permit to prevent confiscation.
>
> "We agree with the District Judge therefore that on the question of confiscation the pleaded judgment was res adjudicata of that issue." (p. 905)

It is true that the court in the Gulf Land Company case overruled the plea of **res adjudicata** in so far as the second permit was granted to prevent waste, whereas the prior permit had not been granted on that ground. However, this fact presents no material distinction in the case at bar, because the permits here involved were granted solely to prevent confiscation, whereas the permit canceled in Cause No. 54769 was granted both to prevent confiscation and waste; and a permit granted on one ground is not sustainable on another ground. **Gulf Land Co. v. Atlantic Refining Co.**, 134 Tex. 59, 131 S. W. (2d) 73.

There have been no material changes in conditions in the case at bar, because the Commission had no more legal authority to grant a permit on the 2.33 acre strip separately, to prevent confiscation in 1939 than it did in 1934. At neither time did the Commisson have such authority. Furthermore, although the Commission should have considered the matter from the standpoint of the west 52.33 acres, but did not, the undisputed proof shows that on the ground of "confiscation" additional wells on the 52.33 acres are no more necessary now than formerly, to enable the west 52.33 acres to recover its fair share of the oil, which is the test so far as concerns the term "confiscation" as used in the spacing rule.

While Burford and X Y Z Oil & Gas Company were not parties to appellants' suit against Mamie Hammonds and Schroeder, they are nevertheless bound by that judgment because the doctrine of **res adjudicata** extends not only to the immediate parties, but also to those who stand in privity with them, and they hold the interest they acquired by assignment from Hammonds and Schroeder subject to that judgment. **Cain v. Balcom**, 130 Tex. 497; **Crane v. Blum**, 56 Tex. 325.

The proper court of the State in Cause No. 54,769 had already finally adjudicated that this strip was not entitled to development as a separate tract. This condition has in nowise changed, nor can it change, until the strip is consolidated with some adjoining land, such as the west 50 acres from which it was subdivided.

In **Edgar v. Stanolind Oil & Gas Co.**, (Civ. App.) 98 S. W. (2d) 222 (writ of error dismissed), the court referred to its holding in a former suit (**Edgar v. Stanolind Oil & Gas Co.**, 90 S. W. (2d) 656, writ re-

fused), and observed that it had canceled the permit in the former suit on three grounds, the second ground being that the strip had been voluntarily subdivided from a larger tract after Rule 37 was in force; **and held that the Commission was without power to grant a permit on the same subdivided strip, considered separately, under the exception clause "to prevent confiscation," on the theory that there had been a "change of conditions."** The court said, p. 233, ". . . but the second ground adjudicated Edgar's right to well No. 3 under conditions then or thereafter existing under Rule 37. **There was nothing left within the Commission's powers or jurisdiction to pass upon."**

This result necessarily flows from the holding of the Supreme Court of Texas in **Gulf Land Company v. Atlantic Refining Co.**, 134 Tex., 59, that a tract subdivided in violation of the spacing rule is not entitled to protection against confiscation, and that the Commission has no power to grant it a permit on that ground. The Commission did not disregard the subdivision when it granted the Hammonds and Burford permits, and each was granted under the "confiscation" exception clause. We submit it is not legally possible for there to have been a change of conditions entitling the Commission to disregard now the fact that the strip is a subdivision in violation of its rule.

But even if that were possible as a legal proposition, what material changes, if any, have taken place? First, petitioners say that there have been three or four additional wells drilled on the Sun lease, and at least two additional wells on the Magnolia lease. How is that material? It might tend to show that there is **more** drainage from the strip now than there

was in the past, but that could not possibly be the test, for a tract that is entitled to separate development under the rule is entitled to **at least one well as a matter of law,** whether it is being drained or not, and even though such well might give the strip an advantage over its neighbors or cause waste. **Dailey v. Railroad Commission,** (Civ. App.) 133 S. W. (2d) 219, 221 (writ of error refused); **Wencker v. Railroad Commission,** (Civ. App.) 149 S. W. (2d) 1009, 1012; **Stanolind Oil & Gas Co. v. Railroad Commission,** (Civ. App.) 96 S. W. (2d) 664.

Petitioners further say the judgment is not **res judicata** because there have been "notorious changes in pressure, water encroachment and heavy withdrawals of oil." This is not a material change of conditions, because those changes are common to the entire field. See express holding in **Railroad Commission (Acme) v. Humble Oil & Refining Company,** (Civ. App.) 119 S. W. (2d) 728 (writ refused.)

Petitioners point to no evidence whatever of any reason why this strip is now entitled to separate development that would not have been equally applicable at the time the judgment was rendered in the former case, and the judgment is clearly **res adjudicata.**

III.

Under the settled law of Texas the pendency of Cause No. 53915, involving validity of a permit previously granted to Mamie Hammonds on this same strip, and placing in issue the right to drill the strip as a separate tract, deprived the Railroad Commission of jurisdiction to grant Burford permits to drill on the strip.

Cause No. 53915, styled Sun Oil Company v. Railroad Commission and Mamie Hammonds, in which Magnolia intervened, was pending in the District Court of Travis County for final trial at the time Burford's application was filed, heard and granted by the Railroad Commission. (R. 205-6, 208) Said suit was for the purpose of canceling still another order granting Mamie Hammonds permit to drill on this same strip, and it was an issue in said suit that the strip, being a subdivision, was not entitled to be developed as a separate tract under the spacing rule. (R. 192, 197-8, 203)

Cross-petitioners urged before the Railroad Commission that it was without jurisdiction of Burford's application because of the pendency of said suit (R. 157, 236-7, 238, 295, 331), and the complaint asserts that Burford's permits were void because the Commission was without jurisdiction. (R. 13-14)

Under the law of the State the Railroad Commission is without jurisdiction to grant additional permits on a tract while the courts are in the process of determining validity of a drilling permit previously granted on the same tract. The Railroad Commission had no jurisdiction to grant the Burford permits, and they are void under the established law of the State. **Stewart v. Smith,** 126 Tex. 292, 83 S. W. (2d) 945, 947, holding " . . . after the judicial arm of the state had assumed jurisdiction of the matter, the Railroad Commission undertook to act again * * * the Railroad Commission was without jurisdiction." **Gulf Oil Corporation v. Rudco Oil & Gas Co.,** (Civ. App., 1942) 164 S. W. (2d) 222; **Barnsdall Oil Co. v. Railroad Commission,** (Civ. App.) 90 S .W. (2d) 663, 664; **Edgar v. Stanolind Oil & Gas Co.,** (Civ. App.)

90 S. W. (2d) 656 (writ refused); **Turnbow v. Barnsdall Oil Co.**, (Civ. App.) 99 S. W. (2d) 1096, 1100 (writ refused); **McNeny v. Railroad Commission,** (Civ. App.) 96 S. W. (2d) 96, 98-9, holding:

> ". . . as long as a suit is pending to test the validity of a permit to drill on a specific tract of land as an exception to rule 37, the Commission is deprived of all jurisdiction to entertain or consider a subsequent application for such permit, and any order it may enter in that regard is void."

In support of their contention that the Hammonds permit involved in Cause No. 53915 had been abandoned, petitioners cite only a statement to that effect made by the attorney for Burford. No evidence of abandonment was offered. The attorney's statement is not evidence, and is conclusively refuted by the record, which shows that Cause No. 53915 was still pending when the Burford application was heard (R. 236-7, 238) and the final judgment thereafter entered in the cause by the District Court recites that all parties appeared for trial, that the court heard the evidence and the argument of counsel and the court rendered judgment. (R. 208-9) In the McNeny case, **supra,** this same contention was urged and overruled, the court holding that so long as the permittee remained in a defensive position in the pending suit to cancel the permit, there is no abandonment; and that is the situation here, as shown by the final judgment in Cause No. 53915.

Petitioners contention that the pendency of Cause No. 53915 did not deprive the Railroad Commission of jurisdiction because the permit involved in that case was void for want of notice and hearing is contrary

to the holding in **Barnsdall Oil Co. v. Railroad Commission,** 90 S. W. (2d) 663-4, and **McNeny v. Railroad Commission,** 96 S. W. (2d) 96.

The State law on this point is settled beyond question.

IV.

The act of the Commission in granting a permit for four wells on the strip was invalid under the Texas law, because there was no evidence that the strip, if entitled to separate development, needed four wells to prevent confiscation (i.e., to recover its fair share of the oil), and the undisputed evidence showed that one well will produce more than the amount of oil under it.

It was shown that Burford did not contend he needed four wells to enable him to recover the equivalent of the oil in place under the strip (R. 233-293, 294 317, 318-365), but that one well on the strip would produce more oil than there is under it. (R. 362-3) The Commission's proration order allowed each well in the area to produce up to a flat 20 barrels per well daily, irrespective of the size of the tract or reserves in place. (R. 370) Sun's 50 acre lease had seven wells and Magnolia's 50 acre lease had six wells (R. 18, 104, 141), from which it follows that the allowable of four wells on the strip would be approximately 4/7th as great as the total allowable from Sun's 50 acres and approximately 2/3rds as great as the total allowable of Magnolia's 50 acres; and this will result in drainage from the adjacent tracts. (R. 349-350; 368-9) It is undisputed that with four wells on the strip, Sun would lose between 70,000 and 100,000 bar-

rels of oil which its wells might otherwise have produced, valued at $1.10 per barrel (R. 369), and Magnolia's loss of oil to the Burford locations will be about 50% as much as Sun's loss. (R. 377) The four locations on the strip are each approximately 24 feet from cross-petitioners' leases, whereas cross-petitioners' nearest wells are roughly 330 feet from the strip (R. 104), and allowance of the Burford locations will make it necessary for Sun and Magnolia to drill additional wells "just to meet the offsets." (R. 368-9) The high concentration of wells which would result would lower the pressure, reduce the flowing life, increase the operating expenses, and thereby cause loss to cross-petitioners. (R. 371, 376-7) Cross-petitioners expressly urged before the Commission that four wells on the strip as a separate tract were not necessarily to give it an opportunity to produce the equivalent of the oil under it; that one well would give it a great advantage over cross-petitioners' leases, and four wells would confiscate their property without compensation and deny them due process of law and equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States. (R. 158)

The "confiscation" exception clause in the spacing rule relates to giving a tract, entitled to development, such number of wells as are necessary to enable the owner thereof to recover the oil and gas in place under the tract, **or their equivalents in kind. Gulf Land Co. v. Atlantic Refining Co.**, 134 Tex. 59, 131 S. W. (2d) 73, 85; **Railroad Commission et al. v. Gulf Production Co.**, 134 Tex. 122, 132 S. W. (2d) 254, 255. Obviously, the Commission made no attempt to apply the term in that sense to this 2.33 acre strip in grant-

ing it four wells, when the undisputed testimony showed that one would produce more than the oil in place under it; and as stated in **Atlantic Refining Co. v. Buckley,** (Civ. App.) 123 S. W. (2d) 413, 415 (writ dismissed), "The net result of this would be that under the guise of protecting this small tract from confiscation, he would be enabled to confiscate oil from adjacent tracts."

In the Gulf Land Company case, the Texas Supreme Court said, page 85:

> "In administering our oil and gas conservation statutes, **the Commission must be fair, and must not indulge in unreasonable discriminations between different oil fields, or between different tracts of land in the same field.** * * *
>
> "In the exercise of its power to grant exceptions to its rules, it is the duty of the commission to treat all interested parties justly, fairly, and impartially under all the facts and circumstances of the case; * * *" (Emphasis ours)

The Commission is without power, under the confiscation ground of exception, to grant a tract permits for more wells than are necessary for such purpose, and therefore its action in granting four, when one will produce more than the oil under the strip, was arbitrary and should be annulled. **Railroad Commission, et al. v. Gulf Production Co.,** 134 Tex. 122, 132 S. W. (2d) 254, affirming opinion of Court of Civil Appeals in 115 S. W. (2d) 505; **Gulf Land Co. v. Atlantic Refining Co.,** 134 Tex. 59, 131 S. W. (2d) 73; **Atlantic Oil Production Co. v. Railroad Commission,** (Civ. App.) 85 S. W. (2d) 655; **Edgar v. Stanolind Oil & Gas Co.,** (Civ. App.) 90 S. W. (2d) 656,

658 (writ refused); **Railroad Commission v. Arkansas Fuel Oil Co.**, (Civ. App.) 148 S. W. (2d) 895, 898; **Gulf Oil Corporation v. Smith**, (Civ. App.) 145 S. W. (2d) 280, 283; **Allen v. Gulf Oil Corporation**, (Civ. App.) 139 S. W. (2d) 207, 209; **Spear v. Humble Oil & Refining Co.**, (Civ. App.) 139 S. W. (2d) 212, headnote 3; **Shell Petroleum Corporation v. Railroad Commission**, (Civ. App.) 137 S. W. (2d) 797, 798.

Even if the court had been authorized under the State law to hold that this strip was entitled to separate development, there was no evidence of a necessity for granting the strip four wells, or any number more than one, to prevent confiscation. Petitioners have wholly failed to point out any evidence refuting the undisputed testimony that one well would give the strip its full share of the oil, and an advantage in drainage opportunity over all adjacent tracts.

Petitioners' Brief, page 5, states that cross-petitioners' leases had already produced about 5,000 barrels of oil per acre but the oil had been fully replaced by migration; and further insists on page 32 that the Commission did not abuse its discretion in grantng four wells instead of one. They point to no evidence showing a necessity for four. The mere fact that the adjoining leases had produced 5,000 barrels per acre does not negative the undisputed testimony of the petroleum engineer that, in the light of the future life of the area and the present allowables, one well on the strip would produce more oil than is under it.

What possible difference could it make that the adjoining leases have produced oil in the past, if Burford by operating one well in the future can obtain more than his share? **At the hearings before the Commission it was not contended that this strip needed**

four wells in order to obtain its share of the oil or to catch up with past production of the adjoining leases, (R. 233, 294, 318) and the Commission has not so decided, and had no evidence before it developing this new idea advanced by petitioners for the first time on appeal. The sole reason for four wells urged by Burford at the hearing was that they were necessary to prevent waste—a theory rejected by the Commission in granting the permit solely to prevent confiscation. (R. 30, 32, 153, 155)

The force which has replenished the oil under cross-petitioners' leases must also have kept the Burford strip full of oil, and the strip still has in place its original quantity and has suffered no net loss through past production from neighboring leases.

Petitioners are clearly in error in stating that the granting of four wells instead of one involves a mere matter of discretion with the Railroad Commission, with which the courts will not interfere. They do interfere under the State law. Witness the many cases cited, supra, p. 38, in each of which the court canceled permits for additional wells, granted under the "confiscation" or "vested rights" exception clause, where the evidence showed that the tract did not need additional wells for that purpose, and the Commission, therefore, had abused its power in granting additional wells.

V.

The evidence heard by the District Court was not sufficient to sustain its findings and conclusions that the order attacked was valid under the State law.

This contention, in reply to petitioners' fourth point, is sufficiently presented by the argument under the foregoing points.

VI.

The action of the Railroad Commission in permitting four wells on the strip in the light of the existing proration order and cross-petitioners' offer to pool their properties with the strip for development purposes, when it was undisputed that one well would have given it more than its full share of the oil, and without making proper provision for the protection of cross-petitioners' properties by adjusting the allowable of the wells on the strip, exceeded the necessities of the case, and was arbitrary, discriminatory, and confiscatory as to cross-petitioners, and denies them equal protection of the law and takes their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and the law of Texas.

As hereinabove shown one well on the strip would give it more than its fair share of the oil, and four wells on the strip, although granted on the "confiscation" ground, are not necessary for such purpose, but will cause great injury to cross-petitioners.

Cross-petitioners tendered before the Commission (R.158) and also in court (R. 19) an offer to pool their leases with the strip for development as an entire tract in either of three ways: (a) the strip and the Sun lease; (b) the strip and the Magnolia lease; and (c) one half of the strip with the Sun lease and one half with the Magnolia; and under either method offered to share ratably the future production from the pooled property in proportion to the acreage so contributed by each owner, less deduction in the same proportion for future drilling and operating expenses.

Cross-petitioners, in the alternative, requested the Commission, in case it should hold that there is any reasonable basis for permitting the drilling of each or either of said four locations on the strip as a separate tract, to so adjust the allowable production of such locations as the Commission should decide to permit on the strip, and so condition the permit therefor, that the total daily allowable production from the 2.33 acre strip shall not exceed 2.33/100th of the total daily allowable production for the remaining and adjoining 100 acres of the Fuller tract; and urged that such provision and condition would enable Burford to produce only his fair share of the oil in place. (R. 159-160) The Commission denied all relief so requested by cross-petitioners. (R. 161)

The Complaint expressly alleged that four wells are not needed to give the strip an opportunity to produce its share of the oil, that one well would give it more than its share, and the other injurious effects upon cross-petitioners resulting from granting four wells (R. 17-18, 21-23, 26-27); that the granting of four wells was in violation of the State law (R. 12); that they have no recourse for the value of the oil and gas which will be drained from their property (R. 23); that the granting of four wells under those circumstances denies them equal protection of law and deprives them of their property without due process of law (R. 23); that if there was any basis for granting four wells, the order was nevertheless unreasonable, discriminatory, and confiscatory in the light of the allowable order, because the Commission could have adjusted the allowable, thereby materially lessening the injury to cross-petitioners, and the granting of the permits without such adjustment or other proper pro-

vision for the protection of their property exceeded the necessities of the case and is arbitrary, unreasonable, discriminatory, and confiscatory, violating their rights under the Fourteenth Amendment to the Constitution of the United States and the State law. (R. 24-5)

Undisputed testimony shows that the granting of the alternative request for adjustment of allowable would have given Burford his share of the oil and would have lessened the drainage from cross-petitioners' leases. (R. 370-1)

In **Brown v. Humble Oil & Refining Co.**, 126 Tex. 296, 83 S. W. (2d) 935, 944, the Supreme Court of Texas held:

> "The exercise of the police power under this rule does not change the rule of property. It merely regulates and controls the way in which his property shall be used and enjoyed. **Each person still owns the oil and gas in place under his land, and each still has the right to possession, use, enjoyment, and ownership of the oil and gas produced through wells located on his land, regardless of its origin. The primary rule of ownership is still operative. The rule of convenience becomes secondary.**" (Emphasis ours.)

It further held that if conditions arise where it would be proper to drill on a subdivided strip,

> "**. . . in all such instances it is the duty of the commission to adjust the allowable, based upon the potential production, so as to give to the owner of such smaller tract only his just proportion of the oil and gas.** By this method each person will be entitled to recover a quantity of oil and gas substantially equivalent in amount to the recov-

erable oil and gas under his land." (Emphasis ours.)

In **Magnolia Petroleum Co. v. Blankenship,** (CCA 5) 85 F. (2d) 553, 555, 556, the Federal court recognized the above as the law of the State, and we quote from the opinion:

> **"But by thus limiting the sinking of new wells and the production from old ones the right to capture oil has been modified and protection against drainage by offset wells has been impaired, so that adjustments are rendered necessary and new remedies proper.** The provisions above referred to were recently considered by the Supreme Court of Texas in Brown v. Humble Oil Co., 83 S. W. (2d) 935, 944, 99 A. L. R. 1107, Id., 87 S. W. (2d) 1069, 101 A. L. R. 1393, and held valid.
>
> **"But an owner unable to protect himself from drainage by an offset well is given the right to petition the Commission and the Commission has power and a consequent duty to 'prevent injury to adjoining property,' and touching a common pool or portion of it to 'distribute, prorate or otherwise allocate the allowable production among the various producers.'"** (Emphasis ours.)

Railroad Commission v. Gulf Production Co., 134 Tex. 122, 132 S. W. (2d) 254, 255, held:

> " . . . . the facts of this record show, as a matter of law, that a third well on this tract would enable Tippett to recover more than his fair share of the oil and gas in or under his land, or their equivalents in kind. Under such a record, the granting of this permit to prevent confiscation was an abuse of power on the part of the Commission, and therefore unlawful."

Ownership in place is a rule of property in Texas. **Brown v. Humble Oil & Refining Co., supra.** By the conservation statutes and rules cross-petitioners are limited both in number of wells they may drill and the quantity of oil and gas they may produce, so that they may no longer fully fend for themselves; and because of this, proper provision must be made so that Burford and X Y Z Company may not take undue advantage of them. **Henderson v. Terrell,** (W. D. Tex., 1938) 24 F. Supp. 147, 152. The "Commission must be fair and must not indulge in unreasonable discrimination . . . between different tracts of land in the same field." **Gulf Land Co. v. Atlantic Refining Co.,** 134 Tex. 59, 131 S. W. (2d) 73, 85.

The State conservation statutes provide: " . . . the Commission shall distribute, prorate, or otherwise apportion or allocate, the allowable production among the various producers on a reasonable basis"; and impose upon the Commission the duty to "make and enforce rules, regulations, or orders . . . to require wells to be . . . operated in such manner as to prevent injury to adjoining property." (Acts 1935, 44th Leg., p. 180, ch. 76, Secs. 6 and 2; Ver. Tex. Stats. 1936, Art. 6049c, Sec. 7; Art. 6008, Sec. 6.)

The granting of four wells on the strip, without adjusting the allowable, has the effect of taking oil from cross-petitioners and giving it to Burford and X Y Z Company. This is confiscatory and discriminatory. **Consolidated Gas Utilities Corp. v. Thompson,** 14 F. Supp. 318, 328.

In the case at bar, the undisputed proof shows that defendants will receive all the oil they are entitled to, and more, through one well, and to grant four wells without adjusting the allowable will give them a

greatly increased advantage in drainage opportunity, resulting in great injury to cross-petitioners. Under this undisputed proof, it is really amazing that the Commission, having the duty to deal equitably with all parties before it, would do nothing whatever toward protecting cross-petitioners in this situation. By adjusting the allowable the Commission could have lessened or prevented the injury which cross-petitioners will otherwise suffer. The Commission granted this permit in the light of its existing proration order, giving each additional well 20 barrels daily, irrespective of density, acreage, or reserves in place. The granting of the permit in the light of that order, and without providing for an adjustment as expressly requested by cross-petitioners, is arbitrary, unreasonable, and discriminatory. It does not meet the test of fair dealing. The police power cannot be used as a tool of oppression for the purpose of benefiting one at the expense of another. This court should not countenance or uphold any purported exercise of police power which unnecessarily confiscates cross-petitioners' property for the benefit of petitioners. Since there was a way open to the Commission to accomplish any legitimate objective without enabling petitioners to drain and take an additional quantity of cross-petitioners' oil, the Commission's failure to follow such fair and open route exceeds the necessities of the case under any conceivable view of fairness and renders its order unjust and unreasonable, and denies cross-petitioners equal protection of law and deprives them of their property without due process of law, in violation of the Fourteenth

Amendment to the Constitution of the United States, and the law of Texas.

In an effort to protect their own property, cross-petitioners have made every conceivable reasonable offer under which the owners of the strip would get their share of the oil. Petitioners have shown no response. Surely the courts cannot close their eyes to this utter failure of the administrative body to deal fairly between competing operators, which plainly takes from one and bestows upon another.

VII.

It was the duty of the trial court and the Circuit Court of Appeals to apply the State law and grant cross-petitioners the relief they were entitled to thereunder, the federal court having jurisdiction both on grounds of diversity of citizenship and federal questions.

The trial court found that it has jurisdiction on grounds of diversity of citizenship and Federal questions involved. (R. 88, 2, 90) Of course, it is also a statutory suit under Section 8 of Article 6049c, footnote 1, **supra**, p. 3. (R. 34)

A citizen of another state may invoke the jurisdiction of the Federal court to defend his property against illegal acts of the State officers whenever a citizen of the State can go into the courts of the State and do so. **Reagan v. Farmer's Loan & Trust Co.**, 154 U. S. 362, 14 S. Ct. 1047, 1052. A Federal court sitting in Travis County is a "court of competent jurisdiction in Travis County" authorized by Texas statute to hear suits to set aside orders of the Railroad Com-

mission of Texas. **Reagan v. Farmer's Loan & Trust Co., supra; MacMillan v. Railroad Commission,** 51 Fed. (2d) 400, in which it appears at page 403 of the opinion that the suit was under the statute in oil and gas matters and wherein the court held, page 405, "As usurpations, under the authority of the statutes of Texas authorizing this suit, we strike them down."

In **Erie v. Tompkins,** 304 U. S. 64, 58 S. Ct. 817, headnote 2, this Court held, "In Federal courts, except in matters governed by Federal constitution or by acts of Congress, law to be applied in any case is law of the State."

This doctrine was applied by the Circuit Court of Appeals in **Gulf Land Co. v. Atlantic Refining Co.,** 113 Fed. (2d) 902 (CCA 5th), a case of similar nature.

Siler v. Louisville & N. R. Co., 213 U. S. 175, 29 S. Ct. 451, 53 L. Ed. 753, holds that the presence of a Federal question may also open up State issues for decision of the Federal court, even though diversity of citizenship is not involved.

The Circuit Court of Appeals has departed from the accepted and usual course of judicial proceedings in this: Under the established law of the State of Texas applied to the undisputed facts, the permit orders involved are void and cross-petitioners are entitled to judgment annulling them and ancillary injunctive relief. The trial court stated in the conclusions of law that it is of the opinion that "the various matters of state law raised present no Federal questions and furthermore present no matters of such merit as to warrant the issuance of an injunction"; and further suggested that, under its interpretation of this court's opinions in **Railroad Commission v. Rowan & Nichols Oil Co.,** 310 U. S. 573, 60 S. Ct. 1021,

and **Railroad Commission v. Rowan & Nichols Oil Co.,** 311 U. S. 570, 61 S. Ct. 343, the parties should be "relegated to the state courts" for determination of the matters of state law (R. 91-2); but the judgment of the trial court dismissed the complaints without reserving to cross-petitioners the right to present matters of state law to the state courts (R. 87); and in legal effect this is an adverse adjudication of such matters, under the state and federal decisions. 34 **C. J.** 788, Sec. 1206; **Jones v. City of Uvalde,** (Civ. App.) 144 S. W. (2d) 932 (writ refused); 26 **Tex. Jur.** 95, Sec. 397; **Baker v. Cummings,** 181 U. S. 117, 21 S. Ct. 578; **McWilliams v. Blackard,** (CCA 8) 96 F. (2d) 43; **Sacks v. Stecker,** (CCA 2) 62 F. (2d) 65, headnotes 8 and 9; **Wilson Cypress Co. v. Atlantic Coast Line R. Co.,** (CCA 5) 109 F. (2d) 623, 625; **Brooks v. Arkansas-Louisiana Pipe Line Co.,** (CCA 8) 77 F. (2d) 965, 968.

Although cross-petitioners requested the Circuit Court of Appeals to adjudicate the matters of state law and render judgment thereon for cross-petitioners, that court did not adjudicate such matters, nor determine whether they had been rightly or wrongly decided by the trial court. On the contrary, though recognizing the duty of the federal courts to apply the state law (**Erie R. Co. v. Tompkins, supra; Siler v. Louisville & N. R. Co., supra**) it reversed and remanded the case with instructions to the trial court to again adjudicate the matters of state law. (R. 436, 448, 481)

Cross-petitioners urge that under the usual and accepted procedure it was the duty of the Circuit Court of Appeals to adjudicate the matters of state law and itself render judgment thereon for cross-petitioners, the requisite facts being undisputed. The

Circuit Court of Appeals could determine such law questions as readily as the trial court, and by doing so additional delay and expense of litigation would be avoided. Having granting a writ of certiorari, this court may render the final decree which the Circuit Court of Appeals should have rendered, under authorities cited, **supra**, p. 2.

We understand petitioners' contention is that cross-petitioners have been accorded more relief by the Circuit Court of Appeals than they are entitled to under the Rowan & Nichols cases, and that of all decisions rendered herein, only that of the trial court correctly applied the principles announced by this court in those cases.

We submit to the contrary that the Rowan & Nichols cases clearly do not hold that the Federal courts shall refuse to adjudicate and apply matters of State law arising in cases where, as here, the State law on the particular point is not in doubt, but has been declared by the highest court of the State, and where such matters of state law arise on undisputed evidence, with respect to a quasi-judicial rather than a legislative determination of an administrative body, and the scope of the judicial inquiry into the validity of such quasi-judicial order allowed by the State statute has been definitely settled by the highest court of the State[6] to be an independent trial **de novo** rather than a mere limited review, and the Federal court has jurisdiction by reason of diversity of citizenship and Federal questions. Because those cases do not deny cross-petitioners' right to the relief they here

[6]Railroad Commission v. Shell Oil Co., 161 S. W. (2d) 1022; Cook Drilling Co. v. Gulf Oil Corp., 161 S. W. (2d) 1035. (Not yet officially reported)

seek of the Federal courts with respect to such matters of State law, we see no need to discuss the scope of their application to cases involving doubtful questions of State law, and questions of State policy on which the State courts have not written.

Extended application of a doctrine that the Federal courts will not adjudicate matters of State law arising in cases within the jurisdiction of the Federal courts would not only amount to a judicial abdication of a large part of the statutory jurisdiction of Federal courts, but the staying of the decision of Federal questions until matters of State law have been adjudicated by State courts would greatly delay the termination of litigation and greatly increase the expense thereof.

Even if the doctrine announced in the Rowan & Nichols cases applies to the very different situation presented in this case, it is clear the trial court did not relegate the matters of State law to the State courts for decisions, but proceeded to decide such questions, and in doing so failed to apply the State law. The trial court's judgment was a straight dismissal, and under the decisions above cited would be **res adjudicata** in case cross-petitioners now presented such questions of State law to the State courts by filing a new suit in the State court.

There is no merit in the contention in paragraph 3, page 11 of Petitioners' Brief, that the district court should not determine the validity of the order under the State law prior to determination of the validity of such order in the State courts, because if the State courts first adjudicated such questions of State law, the judgment of the State court would be **res adjudicata** against a second adjudication of such question by the Federal court; and because the judgment

rendered by the district court actually closed the door to an adjudication of the State law questions by the State court and rendered the latter impossible.

Of course, if this court should decide contrary to the holding of the Circuit Court of Appeals in its opinion of July 11, 1942, that the Federal courts are to decide the questions of State law involved in a case of this kind, then it follows that the trial court's judgment is erroneous by reason of having undertaken to make an adjudication of the merits, and for the additional reason that it incorrectly applied the applicable State law; and in the event of such a holding by this court the judgment of dismissal should be modified so that it would be without prejudice to the presentation of the State law questions to the State courts, as this court did with respect to its own judgment in the first Rowan & Nichols case.

VIII.

The Circuit Court of Appeals had jurisdiction to vacate or correct its original judgment and opinion in this case more than three months after the first petition for rehearing had been denied because the term of court at which judgment was rendered had not expired.

It is a universally recognized rule of law that "During the term in which a decree is entered, the court entering it may, in the exercise of its discretion, on motion for rehearing or otherwise, change, modify, or set aside its decree." **Obear-Nester Glass Co. v. Hartford-Empire Co.,** (CCA 8) 61 F. (2d) 31, 33. The jurisdiction of the Circuit Court of Appeals to grant

the second petition for rehearing and to vacate the judgment theretofore rendered is established by the following authorities: **Bassett v. United States,** (1869) 9 Wall. 38, 41, 19 L. Ed. 548; **Henderson v. Carbondale Co.,** 140 U. S. 25, 11 S. Ct. 691, 696; **Wichita Roy. Co. v. City Natl. Bank of Wichita Falls,** 97 F. (2d) 249, aff'd, 306 U. S. 103; **Bronson v. Schulten,** 104 U. S. 410, 26 L. Ed. 797; **Zimmern v. United States,** 298 U. S. 167, 80 L. Ed. 1118; **United States v. Benz,** 282 U. S. 304, 75 L. Ed. 354; **Ex parte Lange,** 85 U. S. 163, 18 Wall. 163, 21 L. Ed. 872; **Unitype Co. v. Long** (CCA 6) 149 F. 196; **Judson v. Gage,** (CCA 2) 98 F. 540, 543; **Mahler v. Animarium Co.,** (CCA 8) 129 F. 897; **Winslow v. Staab,** (CCA 2) 242 F. 426; **Greyerbiehl v. Hughes Elec. Co.,** (CCA 8) 294 F. 802, cert. den. 44 S. Ct. 402; **I. C. C. v. L. & N. R. Co.,** (U. S. C. C.) 101 F. 146; **Miocene Ditch Co. v. Moore** (CCA 9) 150 F. 483.

We also refer to 34 C. J. 207 and the many cases there cited.

The fact that the mandate had issued is immaterial because the appellate court may, before the expiration of its term, recall the mandate for the purpose of modifying, changing, or setting aside its decree. Rule 32 of the Circuit Court of Appeals; 5 C. J. S. 1561; **Bank v. Tennessee,** (1896) 163 U. S. 416, 16 S. Ct. 1113, 1117; **Thomsen v. Cayser,** (1916) 243 U. S. 66, 37 S. Ct. 353, headnote 1; **Clarke v. Boysen,** (CCA 8) 273 F. 923; **Wichita Roy. Co. v. City Natl. Bank of Wichita Falls, supra.**

Petitioners cite no cases in support of their contention that after the mandate has issued, it is too late to grant a rehearing even at the same term. In **Bank v. Tennessee, supra,** and **Thomsen v. Cayser, supra,** this court allowed a rehearing at the same term, even

though the mandate had been issued, the procedure being to recall and reform the mandate if a rehearing is granted after issuance of the mandate.

Petitioners question the duration of the term. It is sufficient that the Circuit Court of Appeals, which controls adjournment, found that the same term was in effect. (R. 430)

IX.

The Circuit Court of Appeals did not abuse its discretion in granting the second petition for rehearing because the law as announced in Selby Oil & Gas Co. v. Railroad Commission, 128 F. (2d) 334, after overruling the first petition for rehearing, was inconsistent with the law as announced and followed in rendering the original judgment in this case and justice required that the court conform its decision thereto.

There can be no doubt that the rules of law announced and applied by the Circuit Court of Appeals in reversing and remanding the judgment in **Selby Oil & Gas Company v. Railroad Commission**, 128 F. (2d) 334, would, if applied in the case at bar, have necessarily resulted in reversal of the judgment rendered in this case by the District Court and either rendition of judgment for cross-petitioners, or remand of the case for another trial.

The second petition for rehearing was based upon the contrary holding of the same court in the Selby case, made at the same term, but subsequent to the filing and overruling of the original petition for rehearing in this cause. Obviously, the contrary holding of the Selby case could not have been asserted in the original petition for rehearing. The second pe-

tition, therefore, presented a new and unusual situation, calculated to appeal to the purpose of the court to render even justice by applying the same rule of law to all occupying the same position. **Unitype Co. v. Long, supra.**

The decision cited by petitioners construing District Court Rule 59(b) is not applicable here by analogy, in that the Circuit Court of Appeals has no such rule, and the purposes served by the District Court rule are not apposite here.

Having the undoubted right during the same term to correct the manifest injustice of the judgment it had rendered, we submit that there can be no question as to abuse of discretion in doing so.

X.

In the event of a remand, the trial court should independently determine any disputed fact issue in testing the validity of the permit orders involved, as required by the State law.

In this connection we make two contentions:

First, that it was incumbent on the United States District Court in this case to follow the requirements of the "appeal statute"[7] as construed by the highest court of Texas as to the extent of judicial review thereunder.

Second, the statute giving the right of appeal to the Courts to determine the validity of this administrative order has been construed by the highest court of Texas as requiring that the Court hear evidence and make its independent determination of

[7]Art. 6049 c, Sec. 8, quoted in footnote 1, supra p. 3.

all fact issues and its independent determination as to whether the order should be adjudged invalid in the light of its findings.

A.

In support of the first contention we submit:

1. As held in **Erie Railroad Company v. Tompkins,** 304 U. S. 64, 69, the Federal Courts will administer the law as determined by the highest court of the State.

2. This is a statutory appeal from an order of the Railroad Commission (a trial de novo) of which the state courts and the United States District Court in Travis County have concurrent jurisdiction; the latter court entertaining such an appeal is bound equally with the state courts to follow the statute as interpreted by the highest court in Texas in ascertaining the relevant facts and passing on the validity of the order.

In this connection we call special attention to the opinion of the Commission of Appeals of Texas which was adopted as the opinion of the Supreme Court in **Alpha Pet. Co. v. Terrell,** 122 Texas 257, 59 S. W. (2d) 364. That case involved the question as to whether the Legislature could reduce the constitutional jurisdiction of the various district courts of Texas by the provision in the same appeal statute that is here involved that appeals thereunder shall be brought in a court in Travis County.

The Supreme Court held that such suits **are actions to enforce a right that exists only by operation of the statute and not under the Constitution or the common law** and therefore the Legislature, in spite

of the constitutional provisions as to general jurisdiction of the various district courts, could limit the venue to Travis County.

That being true, it must be admitted that the provisions of the statute as to the extent of judicial review thereunder are an essential part of the act creating the right of appeal; that they are descriptive of the right that is given; **that no court should entertain such an appeal, but substantially change its nature.**

In this connection we refer to **Reagan vs. Farmers Loan & Trust Co.**, 154 U. S. 362; **MacMillan v. R. R. Com. of Texas** (D. C.), 51 Fed. (2d) 400; **Gulf Land Co. v. Atlantic Ref. Co.** (CCA 5) 113 Fed. (2d) 902; **Selby Oil & Gas Co. v. Railroad Commission, supra.**

Since this appeal statute was originally enacted in 1931 and later amended in 1935 (Acts 1931, 1st C. S. p. 46; Acts 1935, Reg. Ses. p. 180) long after this Court held in **Reagan v. Farmers Loan and Trust Co.**, 154 U. S. 362, that a similarly worded Texas statute conferred jurisdiction on the Federal Court in Travis County, it must be assumed that the Legislature intended that this special appeal might be entertained by the Federal as well as by a state court in that county.

The Circuit Court of Appeals in its second opinion in the case at bar stated that this is not a constitutional suit and also a statutory suit as was held in the Selby case, but one suit of an equitable nature.

But the Texas Court of Civil Appeals in **Empire Gas & Fuel Co. v. R. R. Com.**, 94 S. W. (2d) 1240, 1244,

which was approved by the Supreme Court of Texas by refusing a writ of error said:

> "Nor did appellant abandon its cause of action by announcing in open court that it abandoned its prayer for injunctive relief against the drilling of said well No. 2 on said 2 3/4 acre tract and the production of oil from same. The issue of the validity of the Commission's order granting the permit still remained. The injunctive relief sought was but ancillary to, and dependent upon, the determination of that issue."

To the same effect is **Davenport v. Railroad Commission,** 89 S. W. (2d) 1006, 1007, subdivision one. (Writ of error dismissed)

In connection with the suggestions in the second opinion of the Circuit Court of Appeals that the appeal statute is not binding on the District Courts of the United States, we refer to **Cox v. Hart,** 145 U. S. 376, 384, holding that statutory provisions as to trial of a trespass to try title case will be followed by the Federal Courts; also to similar holdings in **Travelers Ins. Co. v. Burden,** (CCA 5) 94 Fed. (2d) 880; **Great American Ind. Co. v. Dominguez,** (CCA 5) 84 Fed. (2d) 179, and **Heard v. Texas Compensation Ins. Co.,** (CCA 5) 87 Fed. (2d) 30, 32, all workmen's compensation cases. In the Heard case, 87 Fed. (2d) 32, the Court said:

> "It is settled law that the remedy afforded by the Texas Workmen's Compensation Statutes is exclusive; that the jurisdiction of the District Court is a special jurisdiction and that in a Workmen's compensation case every step provided in the statutes must be taken as there prescribed.

Mingus v. Wadley, 115 Tex. 551, 285 S. W. 1084; Oilmen's Reciprocal v. Franklin, 116 Tex. 59, 286 S. W. 195; Federal Surety Co. v. Jetton (Tex. Com. App.) 44 S. W. (2d) 923."

The Supreme Court of Texas held in **Mingus v. Wadley,** 115 Tex. 551, that suits arising under the workmen's compensation law are in derogation of the common law and that the rights to be enforced and remedies provided are purely statutory.

We cannot understand why the Federal Courts trying a Workmen's Compensation case should follow the state statute and not do so in trying a statutory appeal from a Commission order.

3. The statute providing for appeals to the courts to test the validity of Railroad Commission orders was an essential part of and evidently a condition precedent to the continued exercise by the Railroad Commission of the power to control the drilling and operation of oil wells in Texas and should be construed as a limitation upon the power and inseparably connected therewith.

Each time the Legislature of Texas has conferred power on the Railroad Commission to make orders, rules or regulations in relation to any matter it has provided contemporaneously or later for a statutory appeal to the Courts with authority to hear evidence bearing on the justification therefor and to declare them void.

The present statutory provisions for appeal from orders of the Railroad Commission in railroad matters, gas utility matters and motor bus permits matters are, respectively, Article 6453, Article 5069, and Article 911-A, section 17 of the 1936 Vernon's Texas Statutes.

The jurisdiction granted to the Railroad Commission first for the regulation of railroads and later of the oil and gas industries of the State is one which, if abused, or unfairly administered could result in confiscation and destruction of property rights of inestimable value. The Legislature was so convinced of the necessity for some competent and really effective supervision over the acts of the Commission that it was not content with the general legal and equitable powers of the courts, but created in connection with each delegation of power a special action or appeal.

We submit that these provisions for the special character of appeal are an essential part of each grant of power and cannot be divorced therefrom; that if the special type of appeal fails, the delegation of power must likewise fail.

4. Rule 37, prohibiting closer spacing of oil wells than 330-660 feet, unless special permit is granted by the Railroad Commission after a hearing and pursuant to finding that an exception is necessary to prevent confiscation or to prevent waste, has repeatedly been held to be a valid exercise of the police power and justified as necessary to prevent waste of the natural resources of the state.

Mr. Burford, having sought to take advantage of the provision of this relating to exceptions is in no position to ask the courts of the United States to destroy the essential requirement that the validity of all such exception orders be passed on by the courts in the light of their independent judicial determination of the facts and law.

In **Brown v. Humble Oil & Refining Co.**, 126 Texas 296, 314, 83 S. W. (2d) 935, 945, the Supreme Court said:

> "The application was made to the Railroad Commission for a permit to drill a well on the 1½ acres under the terms of rule 37. The rights granted are by virtue of the exceptions contained in the rule. **That being true, plaintiffs in error are not now in position to attack the validity of the provision of the rule under which they received and now hold their benefits.** Baker v. Coman, 109 Tex. 85, 198 S. W. 141." (Emphasis ours)

We also refer to **Turnbow v. Barnsdall Oil Co.**, 99 S. W. (2d) 1096, 1098, stating:

> * * * "It is also settled that one who claims rights under a rule of the commission cannot assert the invalidity of the rule under which the rights he claims arise, as Turnbow seeks to do."

The Supreme Court, by refusing writ of error in this case, approved this statement of the law.

Equally, the Railroad Commission, deriving all its power from the statutes enacted by the Legislature, is precluded from insisting that it is not bound by the provisions of the statute governing the right and extent of appeal from its orders.

5. The judgments recently rendered by United States Courts upholding administrative orders against constitutional objections because such orders are supported by substantial evidence are in the nature of concessions to the legislative authority that created the administrative bodies. Presumably, in those cases, the authority desired that the attack on the orders of its administrative bodies be so limited.

The State of Texas has by statute as construed by its highest court declared that it desires no such con-

cession and announced the public policy of the State as requiring independent judicial determination by the Court of the facts in this type of case and of the judgment that is required by its findings.

The Federal Government and its courts have no interest in forcing a state to unwillingly accept a limited and ineffectual examination of the validity of orders made by its administrative bodies.

So, logically, a state can prescribe a broader type of appeal, and this requirement should be respected by all courts that acquire jurisdiction. It is in the nature of a refusal to accept an offer to the state to give its agencies immunity from effective supervision by the courts.

In **Railroad Commission v. Rowan & Nichols Oil Co.**, 311 U. S. 570, 576, this Court said:

> "The Constitution does not provide that the federal courts shall strike a balance between ascertainable facts and dubious inferences underlying such a complicated and elusive situation as is presented by the Texas oil fields in order to substitute the court's wisdom for that of the legislative body."

At that time the Supreme Court of Texas had not, as it has now, construed the Texas statute as requiring that the courts, in the statutory appeal from an order granting a drilling permit, should make their independent determination of all fact issues and also of the wisdom of the order in the light thereof.

We submit therefore that the "substantial evidence" rule has no application even to the determination as to whether the order here attacked has denied to

cross-petitioners any rights under the Fourteenth Amendment to the Constitution of the United States.

B.

In support of the second contention we submit:

In **Railroad Commission v. Shell Oil Co.**, 161 S. W. (2d) 1022, 1028, the Supreme Court of Texas used the following language:

> **"The doctrine that the administrative agency should take the testimony and make the findings of fact, and that the findings should be binding upon the court, is foreign to the law of this state.** We have found no Texas decision involving review of the orders of an administrative body which so restricts the court in its taking of testimony. Such doctrine seems to have had its origin in the statutory enactments by the Congress of the United States. These statutes usually provide: 'The findings of the Board (or Commission) as to the facts, if supported by evidence, shall be conclusive.' Mr. Stason in his article in 89 Pennsylvania Law Review, p. 1026, lists nineteen such statutes so enacted by the Congress of the United States. In some of these Congress has gone so far as to provide that the review of the ruling of the Board shall not be by a trial court, but shall be by the Circuit Court of Appeals. In this connection, see the National Labor Relations Act, 29 U. S. C. A., Sec. 160(f).
>
> "Our State Constitution contains the following pertinent provision: 'Article II, Section 1. The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to-wit: Those which are Legislative to one; those which are Executive to another,

and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.' * * * **The taking of the testimony, including the determination of what evidence shall be admitted and what shall be rejected, and the weight to be given thereto, is an important feature of a trial. It often requires a knowledge of the substantive law as well as the application of the rules of evidence. A lay agency, unfamiliar with these principles, might reject material evidence and admit and rely on other evidence that was inadmissible. No system has been provided in this State for reviewing the action of the administrative agency for procedural errors committed in the taking of the testimony, nor for remanding the cause to the agency for a rehearing because thereof. It would indeed be a sorry trial if an agency could thus reject the material evidence of one side and admit and consider the evidence offered by the other, and bind the court as to the facts by the findings made at such a hearing.** In this connection, Chief Justice Hughes in an address before the Federal Bar Association, in 1931, said: 'The power of administrative bodies to make findings of fact which may be treated as conclusive, if there is evidence both ways, is a power of enormous consequence. An unscrupulous administrator might be tempted to say, "Let me find the facts for the people of my country, and I care little who lays down the general principles".'

"In the light of the foregoing constitutional provision, it may well be doubted whether the Legislature of this State would have the authority to transfer from the judicial branch of the government to the administrative branch thereof such an essential part of the trial of a lawsuit as the

taking of the testimony and the determination of the facts. But we need not here theorize on that question. **It is sufficient to say that the Legislature of this State has not undertaken to do so in this instance.** The Act here in question provides for a testing of such orders in the district court in the following language:

"'Sec. 8. Any interested person affected by the conservation laws of this State relating to crude petroleum oil or natural gas, and the waste thereof, including this Act, or by any rule, regulation or order made or promulgated by the Commission thereunder, and who may be dissatisfied therewith, shall have the right to file a suit in a Court of competent jurisdiction in Travis County, Texas, and not elsewhere, against the Commission, or the members thereof, as defendants, to test the validity of said laws, rules, regulations or orders. Such suit shall be advanced for trial and be determined as expeditiously as possible and no postponement thereof or continuance shall be granted except for reasons deemed imperative by the Court. In all such trials, the burden of proof shall be upon the party complaining of such laws, rule, regulation or order; and such laws, rule, regulation or order so complained of shall be deemed prima facie valid. (As amended, Acts 1932, 42nd Leg., 4th C. S., p. 3, ch. 2, Sec. 8; Acts 1935, 44th Leg. p. 180, ch. 76, Sec. 14).' Vernon's Ann. Civ. St. Art. 6049c, Sec. 8. **It will be noted that the above statute refers to the action as a 'suit.' It further provides that, 'In all such trials, the burden of proof shall be upon the party complaining of such laws, rule, regulation or order.' A trial generally includes a judicial examination of the issues between the parties, whether of law or of fact.** 42 Words and Phrases, Perm. Ed., p. 481. Moreover, there would have been no necessity for the placing of the bur-

den of proof if proof was not to be heard. The Act in question clearly contemplates that the evidence shall be taken anew in the district court.

"Much of the confusion that exists concerning the effect to be given to the so-called findings of fact by an administrative agency, upon a contest of an order of such agency in court, arises from the failure to take into consideration the kind of order issued by the agency, and the character of contest that is being made thereon. As above indicated, our statutes do not provide for the making of any findings of fact by an administrative agency. Nevertheless, when the validity of an order of such an agency is contested in court, certain presumptions are indulged in favor of the validity of such order in some instances. If the matter covered by the order is one committed to the agency by the Legislature, and involves the exercise of its sound judgment and discretion in the administration of the matter so committed to it, the court will not undertake to put itself in the position of the agency, and determine the wisdom or advisability of the particular ruling or order in question, but will sustain the action of the agency so long as its conclusions are reasonably supported by substantial evidence. This is so because, since the Legislature has seen fit to vest the authority to exercise sound judgment and discretion in the particular matter in the administrative agency, courts will not undertake to usurp the powers committed to the agency, and to exercise the agency's judgment and discretion for it. For example, in contesting an order of a commissioners' court fixing a tax rate, or an order of a school board concerning the management of schools, the court will not put itself in the position of the administrative agency for the purpose of determining whether or not the action was wise. Wright v. Allen, Tex. Civ. App.,

257 S. W. 980, par. 4, writ refused; Young County Board of School Trustees v. Bailey, Tex. Civ. App., 61 S. W. (2d) 130, par. 2, writ refused. In such a case the issue is not whether or not the agency came to the proper fact conclusion on the basis of conflicting evidence, but whether or not it acted arbitrarily and without regard to the facts. Hence it is generally recognized that where the order of the agency under attack involves the exercise of the sound judgment and discretion of the agency in a matter committed to it by the Legislature, the court will sustain the order if the action of the agency in reaching such conclusion is reasonably supported by substantial evidence. This does not mean that a mere scintilla of evidence will suffice, **nor does it mean that the court is bound to select the testimony of one side, with absolute blindness to that introduced by the other. After all, the court is to render justice in the case. The record is to be considered as a whole, and it is for the court to determine what constitutes substantial evidence.** The court is not to substitute its discretion for that committed to the agency by the Legislature, but is to sustain the agency if it is reasonably supported by substantial evidence before the court. If the evidence **as a whole** is such that reasonable minds could not have reached the conclusion that the agency must have reached in order to justify its action, then the order must be set aside.

"On the other hand, of course, if the purported order, rule, or regulation of the agency undertakes to cover a matter not committed by the Legislature to the judgment and discretion of the agency, or if the statute, like Article 6059, construed by this Court in Lone Star Gas Co. v. State of Texas, Tex. Sup., 153 S. W. (2d) 681, provides otherwise, **the substantial evidence rule hereinabove announced does not apply.**

"The fact, however, that in some instances the action of the agency is to be sustained, if it is reasonably supported by substantial evidence, does not militate against the hearing of the evidence anew in the trial court. In Texas, in all trials contesting the validity of an order, rule, or regulation of an administrative agency, the trial is not for the purpose of determining whether the agency actually heard sufficient evidence to support its orders, but whether at the time such order was entered by the agency there then existed sufficient facts to justify the same. Whether the agency heard sufficient evidence is not material. In fact, the evidence heard by the agency is not per se admissible upon the trial in the district court. Whether it is admissible upon the trial in the district court must depend upon its own merits under the general rules of evidence, and without regard to whether it had theretofore been introduced before the agency." (Emphasis ours)

The highest court in Texas has thus held that appeals from orders, rules and regulations of the Railroad Commission are to be divided, in respect to the scope of judicial review, into two classes, first, those as to matters as to which the Railroad Commission is authorized to exercise its discretion; in which the appeal is to be on the "reasonable minds might differ" rule, and second, those as to matters that do not involve such discretion and those in which the statute provides for a broader appeal. We submit that the case at bar comes within both branches of the second classification. After quoting the appeal statute, the Supreme Court, in the Shell case, 161 S. W. (2d) 1029) used this significant language:

" * * * It will be noted that the above statute refers to the action as a 'suit.' It further pro-

> **vides that, 'In all such trials, the burden of proof shall be upon the party complaining of such laws, rule, regulation or order.' A trial generally includes a judicial examination of the issues between the parties, whether of law or of fact.** 42 Words and Phrases, Perm. Ed., p. 481." (Emphasis ours)

We further insist that the instant case comes within the second class because the Railroad Commission had no discretion to grant or refuse the Rule 37 exceptions that were applied for by Mr. Burford. The application must be decided according to the existing facts.

Rule 37 provides for exceptions only after the Commission, pursuant to a public hearing, has determined that the well desired is necessary either to prevent waste or to prevent confiscation. (Rec. 133) Clearly this rule is binding on the Commission and precludes it from granting such a permit except pursuant to a bona fide and honest finding that it is necessary either to prevent confiscation or to prevent waste.

In passing on a similar question the Supreme Court, in **Brown v. Humble Oil & Refining Co.**, 126 Tex. 296, 314, 83 S. W. (2d) 935, 945, said:

> "The decisions of the Railroad Commission on this question must be based upon proof, and **must not be capricious or unreasonable. The mere holding of a hearing does not justify its action. If after a hearing the commission acts without regard to the evidence,** or makes a ruling wholly unsupported by the evidence, it cannot be said to have exercised its discretion. And where it is shown that the commission has abused its discretion, or has acted illegally and issued a permit in violation of its rules, the courts are fully authorized to nullify the permit of the commission

and prevent its enforcement. Shupee v. Railroad Commission, 123 Tex. 521, 73 S. W. (2d) 505; 42 Corpus Juris, pp. 691, 692." (Emphasis ours)

While the author of that opinion used the word "discretion" in this connection, it is evident that the court did not thereby hold that the Commission had discretion to grant or refuse a permit on a given state of facts. This is evident because the Court says in effect that if "the Commission acts without regard to the evidence" the permit cannot be upheld.

Also because the Court, in **Gulf Land Company v. Atlantic Ref. Co.**, 134 Tex. 59, 72, 131 S. W. (2d) 73, 81, a statutory appeal from a well permit order, said:

> "* * * **In ascertaining and making fact findings the Commission exercises quasi judicial powers. It should therefore always approach each case with a judicial bearing, with but one purpose and aim in view, and that to make a fair finding.**" (Emphasis ours)

This conclusion is fortified by the holding in the Shell case under discussion (161 S. W. (2d) 1030) that the evidence heard by the Railroad Commission is not per se admissible on the trial in the District Court; and by the holding of the Supreme Court in **Cook Drilling Co. v. Gulf Oil Corporation,** 161 S. W. (2d) 1035, 1036, in which the Court used the following language:

> "The trial contemplated by the Act in question is not for the purpose of determining whether the Commission actually heard sufficient evidence to

support its order, but whether there then existed sufficient facts to justify the entry thereof. Since there is to be a full hearing of the facts in the district court, whether the Commission actually heard sufficient evidence to sustain the order is not material. As is well known, hearings before the Commission are informal. In the vast majority of instances its orders are not contested. It would be placing a useless and intolerable burden on the Commission to require it to make an 'appeal-proof' record in every instance. **The rights of the parties will be fully protected if, upon a contest of the order in the district court, the parties are given full opportunity to show that at the time the order was entered there did, or did not, then exist sufficient facts to justify the entry of the same."** (Emphasis ours)

The trial Court was thus directed to make its own decision as to the facts and also as to whether they justified the entry of the order.

Significantly the Court in the Cook case did not instruct the trial Court to ascertain whether "the evidence as a whole is such that reasonable minds could not have reached the conclusion that the agency must have reached in order to justify its order."

The latter is the test prescribed in the Shell case (161 S. W. (2d) 1022) for review of orders in matters involving discretion; it is conspicuously absent from the opinion in the Cook Drilling Company case.

As the latter was a Rule 37 case, the opinion, in effect, declares that the Commission has no discretion to grant or refuse such a permit; and therefore that the substantial evidence rule does not apply.

It is true that the Supreme Court in the Cook Drilling Company case held that it is not material whether the Commission actually heard sufficient evidence to sustain the order in a Rule 37 permit appeal.

While this modifies to some extent the pronouncement made in the Brown case above quoted, (126 Texas 314) it would seem to preclude an appeal from such an order on any character of substantial evidence or "reasonable minds might differ" rule.

An application for an exception to Rule 37 which is improperly granted or improperly refused will surely result in confiscation of property. The Commission can grant or refuse such an application without hearing any evidence at all as to its propriety. Surely a rule that such an order must be sustained if the evidence on the trial de novo is such that reasonable minds might differ as to its validity, would be a poor substitute for the type of appeal that is provided by the Texas statute.

CONCLUSION

We submit that portion of the judgment of the Circuit Court of Appeals which remands the case should be set aside and judgment should be rendered for cross-petitioners on the undisputed evidence. If this contention be overruled, then we submit the court should affirm the judgment of the Circuit Court of Appeals reversing that of the trial court and remanding the cause for new trial; and the district court should be instructed to make an independent deter-

mination of any disputed fact issues, in testing the reasonableness and validity of the permit orders involved, as required by the State law.

Respectfully submitted,

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